UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/AC.243/1994/L.3
4 April 1994

ORIGINAL: ENGLISH

AD HOC INTERGOVERNMENTAL WORKING GROUP
OF EXPERTS ESTABLISHED PURSUANT TO
GENERAL ASSEMBLY RESOLUTION 48/218
First session
11-15 April 1994
Item 3 of the provisional agenda*

ALLEGED CASES OF FRAUD IN THE UNITED NATIONS: STUDY OF THE POSSIBILITY OF THE ESTABLISHMENT OF A NEW JURISDICTIONAL AND PROCEDURAL MECHANISM OR OF THE EXTENSION OF MANDATES AND IMPROVEMENT OF THE FUNCTIONING OF EXISTING JURISDICTIONAL AND PROCEDURAL MECHANISMS

Overview by the Secretariat

I. INTRODUCTION

1. In its resolution 48/218 (III) of 23 December 1993, the General Assembly decided, inter alia, to study the possibility of the establishment of a new jurisdictional and procedural mechanism or of the extension of mandates and improvement of the functioning of existing jurisdictional and procedural mechanisms. To this end, the General Assembly decided that an ad hoc intergovernmental working group of 25 members should be established, which would work with the relevant existing bodies and would submit a report with specific recommendations to the General Assembly no later than at its forty-ninth session. The Secretary-General was requested to provide the Group with the necessary services.

2. In taking these decisions, the General Assembly stressed the necessity of proper management of resources and funds of the United Nations; it also expressed its determination to address alleged cases of fraud in the United Nations in an impartial manner, in accordance with due process of law and full respect for the rights of each individual concerned, especially the right of defence.

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* A/AC.243/1994/L.3.

3. The purpose of the present paper is to provide an overview of the jurisdictional and procedural mechanisms that exist in the United Nations. As many aspects of these topics have been the subject of extensive reports submitted to the General Assembly over the years, no attempt will be made to duplicate the detailed reviews that can be found elsewhere. Rather, by cross-reference in the body of the report and through a list of basic reference documents annexed thereto, other relevant material will be drawn to the attention of the members of the Working Group.

4. In the General Assembly discussions leading to the adoption of resolution 48/218 (III), it was clear that the term "fraud" was intended to be understood in a very wide sense, whether or not it actually resulted in a financial loss to the Organization or a financial gain to the party committing the fraud. Thus it may entail an attempt by a party to obtain under false pretences an advantage in some other sense than a direct financial benefit.

5. In the General Assembly discussions, it was also understood that the review to be conducted by the Working Group had to take account of the fact that frauds against the United Nations are perpetrated not only by staff members but also by parties external to the Organization. The review of jurisdictional and procedural mechanisms must therefore consider the remedies available to the Organization in cases where those committing fraud are not staff members.

6. The present report addresses the various aspects of the subject in turn under the following headings:

Section II: General legal and institutional framework
Section III: Standards of conduct
Section IV: Prevention and detection of misconduct
Section V: Internal disciplinary mechanisms
Section VI: The Administrative Tribunal
Section VII: Recovery

II. GENERAL LEGAL AND INSTITUTIONAL FRAMEWORK

7. The United Nations is an international, intergovernmental organization established by the Charter. It has the status of an international person vested with legal personality and possesses rights and duties under international law. 1/ Three attributes of the juridical personality of the Organization are relevant in the present context: (a) its capacity to institute legal proceedings; (b) its privileges and immunities; and (c) the capacity to adopt its own rules for its internal affairs. 2/

A. Capacity to institute legal proceedings

8. Article 104 of the Charter provides that the United Nations shall enjoy in the territory of each of its Member States "such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes". The general scope of such juridical personality is set forth in article I, section 1, of the Convention on the Privileges and Immunities of the United

Nations, adopted by the General Assembly on 13 February 1946 (hereinafter referred to as the "General Convention"), 3/ which provides, inter alia, that the United Nations shall have the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings.

B. Privileges and immunities

9. The capacity given to the United Nations to institute legal proceedings before national courts does not mean, however, that the Organization or its officials are generally subject to the jurisdiction of national courts. Article 105 of the Charter provides that:

> "1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
>
> "2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization."

The privileges and immunities contemplated by the Charter include, pursuant to article II, section 2, of the General Convention, the immunity from any form of legal process except in so far as in any particular case the United Nations has expressly waived its immunity. The inviolability of the premises of the United Nations is recognized in article II, section 3, of the General Convention, which also provides that the property and assets of the United Nations, wherever located and by whomsoever held, shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action. Furthermore, article II, section 4, of the General Convention provides that the archives of the United Nations, and in general all documents belonging to it or held by it, shall be inviolable wherever located. Similarly, article V, section 18 (a), of the General Convention provides that United Nations officials are "immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity".

10. The aforementioned privileges and immunities, however, were not conceived as an absolute obstacle to the exercise of national jurisdiction. The United Nations is indeed required, pursuant to article V, section 21 of the General Convention, inter alia, to cooperate at all times with the appropriate authorities of Member States to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with the privileges and immunities enjoyed by its officials.

C. Capacity to adopt rules governing internal affairs

11. Lastly, the Organization was given the capacity to adopt its own regulations and rules governing its internal affairs. Article 101 of the Charter provides that the staff of the United Nations "shall be appointed by the

Secretary-General under regulations established by the General Assembly". The United Nations has made extensive use of this power and established a particular regime for employment and related matters. The Staff Regulations adopted by the General Assembly and the Staff Rules issued by the Secretary-General provide for the terms of employment, rights, duties, obligations, responsibilities and entitlement of United Nations staff. Such regulations and rules further determine the standards of conduct for United Nations officials (see paras. 15-19 below), as well as disciplinary measures that can be taken in case of misconduct or impropriety by its staff (see paras. 34-41 below). An internal appeal process for the settlement of disputes arising from employment with the United Nations was also established, including review by a quasi-judicial body (Joint Appeals Board (JAB) or Joint Disciplinary Committee (JDC)) and then consideration by the United Nations Administrative Tribunal, which performs judicial functions and delivers binding judgements on the parties (see paras. 42-50 below).

12. Not only employment matters, but also other aspects of the internal affairs of the Organization have been regulated by legislative acts adopted by the General Assembly or administrative issuances promulgated by the Secretary-General. Together with the Staff Regulations and Rules, the Financial Regulations and Rules take a special place within the internal law of the United Nations, as they embody fundamental rules governing the financial administration of the Organization. It is understood that, in respect of the persons, acts or goods governed by the internal law of the Organization, such internal law applies to the exclusion of any national laws.

13. In addition to its intrinsic legislative power concerning internal affairs, the Organization was also given the power to make regulations and adopt rules in order to exercise control over its premises and activities conducted therein. This is, for instance, expressly provided for in article III, section 8, of the Agreement between the United Nations and the United States regarding the Headquarters district, which reads, in its relevant part, as follows:

> "The United Nations shall have the power to make regulations operative within the Headquarters district, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No federal, state or local law or regulation of the United States which is inconsistent with a regulation of the United Nations authorized under this section shall, to the extent of such inconsistency, be applicable within the Headquarters district." 4/

14. The very character of the United Nations as an international Organization, however, imposes limits to the scope of its internal law. For instance, the Organization is not in a position to subject its relations with third parties, such as contractors or suppliers, to its internal law or judicial bodies. Moreover, the United Nations has no criminal jurisdiction under any law or treaty. Matters falling outside the scope of the internal law of the United Nations are thus governed by the laws of the country concerned. For example, article III, section 7 (b) and (c) of the Agreement between the United Nations and the United States regarding the Headquarters district provide:

"(b) Except as otherwise provided in this agreement or in the General Convention, the federal, state and local law of the United States shall apply within the Headquarters district.

"(c) Except as otherwise provided in this agreement or in the General Convention, the federal, state and local courts of the United States shall have jurisdiction over acts done and transactions taking place in the Headquarters district as provided in applicable federal, state and local laws."

It is understood that, notwithstanding the privileges and immunities enjoyed by the Organization and its officials under the General Convention, the criminal laws of the host country concerned apply to acts committed within United Nations premises also in cases where the relevant agreement is silent in this respect.

III. STANDARDS OF CONDUCT

15. Article 101, paragraph 3, of the Charter states:

"The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity ..."

16. Staff regulations 1.4, 4.2 and 4.4 reiterate the principles set out in Article 101, paragraph 3, of the Charter.

17. The report on standards of conduct in the international civil service, 5/ which was reissued in 1986 after the Administrative Committee on Coordination (ACC) had reaffirmed its belief "that the standards [the report] sets forth continue to be as valuable to staff members today as they have been in the past", 6/ underlines certain basic principles, such as the absolute need for staff members to comply with the requirement of integrity:

"One of the fundamental, if not paramount, standards of conduct derives from the requirement of integrity, underlined in Article 101 of the United Nations Charter ... . Integrity, while perhaps not subject to exhaustive and precise definition, must be judged on the basis of the total behaviour of the person concerned. Such elementary personal or private qualities as honesty, truthfulness, fidelity, probity and freedom from corrupting influences, are clearly included. For the international official, however, the Charter also requires integrity as a public official, and especially as an international public official. Perhaps the clearest expression of this is the fact that he has dedicated himself to regulate his conduct with the interests of the international organization only in view. It follows that he must subordinate his private interests and avoid placing himself in a position where those interests would conflict with the interests of the organization he serves." 7/

18. This all-encompassing approach to the requirement of integrity has allowed the Organization to characterize as misconduct, or serious misconduct, a wide

variety of actions or omissions where a staff member had revealed a lack of honesty, truthfulness or probity which may otherwise have been excluded from the application of more specific and technical definitions. The definition of what constitutes fraud, embezzlement, theft, conversion, misappropriation of funds or property, bribery, kickbacks and other forms of corrupt practices, varies from national law to national law but all of these acts are subsumed under the concept of failure to observe the required standard of integrity.

19. Staff rule 110.1 defines misconduct as:

> "failure by a staff member to comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules or other administrative issuances, or to observe the standards of conduct expected of an international civil servant."

There is no doubt that fraud is a clear violation of the standards of integrity, and that, when properly established, it justifies summary dismissal. 8/

IV. PREVENTION AND DETECTION OF MISCONDUCT

A. Internal controls

20. Financial regulation 10.1 of the Financial Regulations of the United Nations provides:

> "The Secretary-General shall:
>
> (a) Establish detailed financial rules and procedures in order to ensure effective financial administration and the exercise of economy; ...
>
> (d) Maintain an internal financial control which shall provide for an effective current examination and/or review of financial transactions in order to ensure:
>
> (i) The regularity of the receipt, custody and disposal of all funds and other financial resources of the Organization;
>
> (ii) The conformity of obligations and expenditures with the appropriations or other financial provisions voted by the General Assembly; or with the purposes and rules relating to trust funds and special accounts;
>
> (iii) The economic use of the resources of the Organization."

21. The United Nations system of financial control is based, for all financial transactions, on a personal delegation of authority to certifying and alternate certifying officers (under financial rule 110.4), to approving officers (under financial rule 108.9) and to procurement officers (under financial rule 110.16); it is also based on the separation of authority, responsibilities and duties to provide checks and balances. For example, certifying officers cannot

simultaneously exercise the function of approving officers. All financial transactions therefore require clearance from two authorized officers.

22. Since a significant portion of the Organization's resources is devoted to staff costs, particular attention is given to the internal control procedures relating to the benefits and allowances received by United Nations staff members. Internal controls in relation to staff entitlements are intended to ensure conformity with the applicable rules and policies governing the granting of such entitlements and to detect and deter any attempts to circumvent these rules and policies. Internal controls consist essentially of verification or confirmation. Each financial entitlement or benefit requires a different method of verification or confirmation, or combination thereof.

23. Both the Financial Regulations and Rules and the Staff Rules of the United Nations contain explicit provisions to protect the Organization against any financial loss which might result from a staff member's violation of such rules or related administrative instructions. Financial rule 114.1 on personal responsibility states:

> "Every official of the United Nations is responsible to the Secretary-General for the regularity of the actions taken by him or her in the course of his or her official duties. Any official who takes any action contrary to these Financial Rules, or to the administrative instructions issued in connection therewith, may be held personally responsible and financially liable for the consequences of such action".

A parallel provision may be found in staff rule 112.3 on financial responsibility, which reads:

> "Any staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's negligence or of his or her having violated any regulation, rule, or administrative instruction."

24. Provisions related to personal responsibility are also included in financial rules 109.5 on losses of cash or negotiable instruments, 110.14 on the writing-off of cash and receivables and 110.15 on the writing-off of losses of property.

25. In addition to the provisions on financial responsibility and control in the Financial Rules and the Staff Rules, there is a standing instruction from the United Nations Controller to all executive and administrative officers at Headquarters and all heads of administration and heads of finance at offices away from Headquarters that they are to notify the Controller, directly and in writing, whenever a case of fraud or presumptive fraud involving the improper use of funds is discovered. This instruction applies irrespective of the source of funds. The Director of the Internal Audit Division is to be notified at the same time. The officials responsible for informing the Controller of cases of fraud or presumptive fraud would be held personally responsible if it were determined, in the course of audit reviews or other developments, that cases of fraud or presumptive fraud involving the improper use of funds had been identified but had not been reported to the Controller.

26. In accordance with an instruction dated 8 February 1994, all heads of departments, offices and missions are to send to the Assistant Secretary-General for Inspections and Investigations information on any alleged misconduct, malfeasance, deliberate mismanagement, abuse or violation of United Nations regulations, rules or pertinent administrative issuances that may have occurred within their department, office or mission since the beginning of 1993. The same officials are also requested to report any such acts that may occur in the future in order to enable the Office for Inspections and Investigations to take the necessary action.

27. As outlined above, United Nations staff members, particularly those holding positions of responsibility in administration and finance, are required to report to senior management any inappropriate uses of the resources of the Organization. Furthermore, ample provision exists, both in the Financial Rules and in the Staff Rules, for assigning personal responsibility to individual staff members for any financial loss incurred by the Organization owing to the inappropriate use of resources. Such provisions, coupled with the provisions in the Staff Regulations and Rules and related administrative issuances on disciplinary measures, also serve as a deterrent to the potential misuse of the Organization's resources.

B. Detection

28. Cases of misconduct come to light in a variety of ways. Most often, they are identified in the course of the routine exercise of internal control and monitoring functions, and are reported to the Controller and the Internal Audit Division, as outlined above. In some cases, a staff member other than one who is responsible for the exercise of a particular internal control function may report what he or she believes to be a case of misconduct. In other cases, cases of apparent misconduct may be found in the course of an internal audit. Sometimes, cases of misconduct or fraud by parties external to the United Nations are brought to the Organization's attention by national law enforcement authorities or by individuals seeking to verify the legitimacy of a claim by one or more persons that they are acting as agents of, or are sponsored by, the United Nations.

29. Once an initial report on probable misconduct or presumptive fraud has been received by the Controller, an immediate determination is made whether additional information or evidence is needed. If so, the Office for Inspections and Investigations (of which the Internal Audit Division forms a part), the head of the office concerned or any other appropriate officials are requested to conduct a further investigation of the matter. This preliminary stage may be very brief (a few days) or may take an extended period, depending on the complexity of the case, especially when it is difficult to obtain the necessary evidence.

30. Cases of apparent misconduct of a staff member are reported, with the evidence collected, to the Director of Personnel.

C. External measures

31. At this stage, a determination is also made whether to involve the assistance of law enforcement authorities at the national or international level. If there is sufficient evidence to support the belief that the perpetrator(s) are not staff members or others having a contractual relationship with the United Nations, the matter is normally referred to law enforcement authorities. As the case develops, a judgement is made on the nature and extent of the Organization's involvement in assisting such law enforcement authorities to pursue the case, with due regard to the Organization's privileges and immunities.

32. Where the alleged perpetrator is a staff member, the case would be turned over to law enforcement authorities at this stage only where the misconduct involved is a criminal act under the national laws of the location where the act was committed. In this event, the United Nations would cooperate with the law enforcement authorities to ensure effective prosecution and would waive its privileges and immunities to the extent necessary to achieve this object (see paras. 9, 10 and 14 above).

33. The Secretary-General has on a number of occasions requested that national authorities investigate cases of alleged fraud against the United Nations, particularly by third parties and by former staff with a view to criminal prosecution. However, audit and other investigatory findings that lead to disciplinary measures against staff are not necessarily supported by the almost conclusive evidence needed by national law to secure criminal conviction. Thus, even if a case results in the summary dismissal of a staff member, the evidence will often not be sufficient to satisfy the standard of proof applicable in criminal matters considered by national courts. Moreover, an act that reveals the failure by a staff member to observe the standards of conduct applicable to United Nations staff (see paras. 15-19 above) does not necessarily correspond to the definitions of criminal offences found in national legal systems.

V. INTERNAL DISCIPLINARY MECHANISM

34. Article X of the Staff Regulations and chapter X of the Staff Rules, which came into effect on 1 January 1990, as explained and amplified by administrative instruction ST/AI/371 of 2 August 1991, 9/ contain the principles and rules applicable in disciplinary proceedings.

35. As more fully explained in the note by the Secretariat on internal disciplinary mechanisms (A/AC.243/1994/L.2), all cases are preceded by an initial investigation and fact-finding, during which the staff member suspected of misconduct is informed of the charges and given the opportunity to explain his or her conduct and to submit any justification or exculpatory evidence that may exist. The staff member is also informed of his or her right to be assisted in the preparation of his or her comments and explanations by any other staff member or retired staff member.

36. At the conclusion of this preliminary stage, the Director of Personnel decides whether:

(a) To close the case, when the staff member's conduct does not amount to misconduct or there is insufficient evidence to proceed, or

(b) To refer the case to JDC, if the facts and the evidence indicate that misconduct has occurred, or

(c) To recommend to the Secretary-General that the staff member be summarily dismissed, if the misconduct is serious and the charges are supported by clear and convincing evidence.

37. Summary dismissal is normally imposed when the misconduct is patent, the evidence is clear or overwhelming and the conduct is clearly incompatible with the standards expected of international civil servants. Fraud has consistently been viewed by the Administrative Tribunal - to which a staff member may apply to challenge any disciplinary measure - as serious misconduct justifying summary dismissal.

38. All cases where the misconduct is not deemed to be serious enough to justify summary dismissal, or where the facts are unclear, are to be referred to JDC which may recommend one or more of the following disciplinary measures listed in staff rule 110.3 (a):

(a) Written censure by the Secretary-General;

(b) Loss of one or more steps-in-grade;

(c) Deferment, for a specified period, of eligibility for within-grade increment;

(d) Suspension without pay;

(e) Fine;

(f) Demotion;

(g) Separation from service, with or without notice or compensation in lieu thereof;

(h) Summary dismissal.

39. Once a JDC has been seized of a case, the Director of Personnel in New York, or the designated official at other duty stations, transmits to the staff member the entire dossier submitted to JDC and advises the staff member of his or her right to be represented by any serving or retired staff member at the duty station where the JDC in question has been established. In addition, the staff member is informed of the composition of JDC, and advised of his or her right to submit any written observations to JDC within a specified time, and of his or her right to suggest other persons of whom inquiry might be made and to request that hearings be held and witnesses called.

40. JDC will consider the case after receiving the Administration's presentation, and the comments of the staff member, if any. The proceedings may

be limited to the consideration of written documents, but, in many cases, they involve hearing(s) that the staff member and an official representing the Administration are invited to attend. Witnesses may be heard, which may mean substantial delays when those witnesses are temporarily away on mission or on leave, and when their return occurs at a time when one or more members of JDC are themselves on mission or on leave. The most simple cases usually take several months.

41. In the light of the JDC report, which is only advisory, the Secretary-General decides whether misconduct has occurred and, if so, what disciplinary measure should be applied.

VI. ADMINISTRATIVE TRIBUNAL

42. The United Nations Administrative Tribunal was established by the General Assembly in 1949 by the adoption of its statute, which has since been amended twice. 10/ The right of staff members to appeal to the Administrative Tribunal is specified in staff regulation 11.2, and that of participants in the United Nations Joint Staff Pension Fund (UNJSPF) is specified in article 49 of the UNJSPF Regulations.

43. Unlike JAB and JDC, which are merely advisory to the Secretary-General or to other specified officials, the Administrative Tribunal is a true judicial body, i.e., a court, whose decisions are final and binding on the Secretary-General or on UNJSPB, as well as on the applicant.

44. In respect of staff members, former staff members, successors to their rights or other persons entitled to rights under any contract or appointment, the Administrative Tribunal has general competence, under article 2(1) of its statute, concerning alleged non-observance of their contracts of employment or the terms of their appointment, including all pertinent regulations and rules, including in respect of disciplinary proceedings. Furthermore, in respect of the same persons, the Administrative Tribunal has specific competence, under article 49 of the UNJSPF regulations, concerning alleged non-observance of those regulations by UNJSPB.

45. In principle, applications to the Administrative Tribunal are not receivable before consideration of the matter by JAB or JDC, unless the Secretary-General and the applicant have agreed that the application may be submitted directly to the Administrative Tribunal. 11/ The scope of the proceedings before the Administrative Tribunal is outlined in the following paragraphs.

46. If the Administrative Tribunal finds that a procedure prescribed by the staff regulations or rules has not been observed, it may, on the request of the Secretary-General, remand the case for the institution or correction of the required procedure and may order the payment of up to the equivalent of three months' net base salary as compensation for the delay.

47. If the Administrative Tribunal finds part or all of the application well founded, it may award damages or may order the rescission of the decision

contested or the specific performance of the obligation invoked; at the same time, it also fixes an amount of alternative monetary compensation, which normally is not to exceed two years' net base salary. The Secretary-General must then decide, within 30 days, whether to accept the rescission of the decision or the performance of the obligation or, instead to pay the monetary compensation.

48. The judgements of the Administrative Tribunal are, in principle, final and binding. However, they may, if the Committee on Applications for Review of Administrative Tribunal Judgements so decides, be submitted to the International Court of Justice (ICJ) for an advisory opinion. 12/

49. It is clear from the above that staff members dissatisfied with any administrative decision taken in regard to them, including the decision to carry out a recovery action or to impose a disciplinary measure, have the opportunity to appeal to a judicial body, which will impartially consider such appeals. It should be noted, however, that, among other limitations that the Secretary-General has, on occasion, brought to the attention of the General Assembly, 13/ the Administrative Tribunal is at present not competent to consider claims of the United Nations against its staff members. Consequently, in cases where the amounts recovered from accrued salary and other emoluments are insufficient to compensate the United Nations fully for losses resulting from the misconduct or impropriety, the Organization has no internal means for obtaining a full settlement of the residual indebtedness of the staff member concerned.

50. For this reason, the Secretary-General proposed to the General Assembly, during its forty-eighth session, that, in order to facilitate the task of civil action for recovery of embezzled funds, where this has not been obtained through recovery from salary and emoluments, the statute of the Administrative Tribunal could be amended to give it jurisdiction to judge claims submitted by the Organization against staff members so that proceedings before national courts would be required only for enforcement of the judgement. 14/

VII. RECOVERY

A. Recovery from accrued salary and emoluments

51. Under the provisions of staff rule 103.18 (b) (ii), deductions from salaries, wages and other emoluments may be made for indebtedness to the United Nations. In cases where it is established that United Nations funds were misappropriated by a staff member, action will immediately be taken to recover as much as possible of the amounts involved from any accrued salary and other emoluments, including terminal payments, of the staff member. Virtually all cases of recovery are achieved in this manner.

52. The decision to proceed with recovery is an administrative decision that can be appealed through the internal appeals process. After consideration by JAB, the Secretary-General reviews the decision in the light of the JAB's report and decides whether to maintain it or change it in any way. The staff member or former staff member may then take the case to the Administrative Tribunal (see paras. 42-50 above).

53. In some cases, the amounts recovered have been negligible because the total of the funds misappropriated far exceeded any sums to which the staff member might otherwise have been entitled. Where a staff member had separated from the United Nations and had received all final payments before the presumptive fraud was discovered, it has usually not been possible to recover any part of the misappropriated funds unless the individual was found to be employed by another organization of the United Nations system. In such circumstances, it has sometimes been possible to make arrangements with the other organization to effect recovery on behalf of the United Nations.

B. Pension benefits

54. Attempts by the Administration to obtain direct recovery of indebtedness from the pension entitlements of staff members were rejected in the past by the Administrative Tribunal of the United Nations, which held that the Regulations of UNJSPF, promulgated by the General Assembly, precluded recovery of amounts due to the Organization from the pension benefits of separated staff. The Tribunal held, furthermore, that the Administration could not refuse to issue the documentation on the basis of which a staff member's pension benefits are processed, in an attempt to induce the former staff member to repay to the Organization the sums misappropriated. The Tribunal considered, however, that the Administration should not be left defenceless in such a case; it therefore suggested that the Administration and the Pension Fund should seek an appropriate solution to similar situations.

55. As a result, the Secretary-General amended the administrative instruction on the subject of the personnel payroll clearance action, 15/ to provide for the non-issuance of documents necessary for processing of pension benefits following separation from service. The Secretary-General believes that this procedure may encourage former staff members to settle their indebtedness to the Organization. However, it should be noted that the Tribunal has not yet had an occasion to examine this instruction.

56. In a report to the General Assembly at its forty-eighth session, the Secretary-General described some of the considerations to be taken into account should the General Assembly wish to pursue the possibility of directly attaching pension benefits as a method of recovering monies due from former staff members. 16/

C. Civil actions for recovery

57. In addition to recovery action taken within the United Nations, it may be appropriate to refer a case to the national authorities for further action. If it appears from the investigation that a third party, or a person who is no longer under the jurisdiction of the United Nations, obtained any undue or illegal financial advantage to the detriment of the United Nations, it is possible to institute civil legal proceedings before a national court with a view towards recovering any sums misappropriated from the United Nations or obtaining compensation for damages sustained by it. It should be noted, however, that, while the capacity of the United Nations to institute legal

proceedings before national courts has been fully recognized by the judicial and other authorities of Member States, 17/ this recognition does not entail any special treatment or privilege other than those provided for in the applicable international agreements. Accordingly, the United Nations would have to seek the assistance of outside counsel and the legal proceedings instituted on its behalf would be, inter alia, subject to the national provisions on procedure. In addition to the difficulties that the national courts might find for establishing the alleged impropriety, particularly when it consisted in the violation or circumvention of internal regulations and rules of the United Nations, the amounts that the Organization can reasonably expect to recover are often not commensurate with the cost entailed in such proceedings. 18/

Reference material

58. A list of basic reference material is contained in the annex to the present document. Copies of these materials will be made available to the members of the Working Group.

Notes

1/ See advisory opinion of 11 April 1949 of the International Court of Justice (Reparation for injuries suffered in the service of the United Nations, ICJ Reports 1949, p. 1982).

2/ A comprehensive overview of the practice of the United Nations concerning its status, privileges and immunities is contained in documents A/CN.4/L.118 and Add.1-2 (Yearbook of the International Law Commission, 1967, vol. II, pp. 154-324) and A/CN.4/L.383 and Add.1-3 (Yearbook of the International Law Commission, 1985, vol. II part 1, pp. 145-210).

3/ See General Assembly resolution 22 A (I).

4/ United Nations Treaty Series, vol. II, No. 147. Similar provisions are contained in other headquarters agreements.

5/ Coord/Civil Service/5, 1986 edition.

6/ Preface to the 1986 edition.

7/ Coord/Civil Service/5, 1986 edition, para. 4.

8/ The Administrative Tribunal has consistently upheld the authority of the Secretary-General to impose summary dismissal in cases of fraud or other kinds of serious misconduct. See, for instance, judgements No. 394 Armijo (1987), sect. XII, No. 425 Bruzual (1988), sect. X, No. 479 Caine (1990), sects. XI and XV.

9/ Refers throughout to the "Assistant Secretary-General for Human Resources Management", whose functions are now exercised by the Director of Personnel.

10/ The statute of the Tribunal appears in document AT/11/Rev.4. The same document contains the rules of the Tribunal, which were adopted by the latter and supplement the statute.

11/ The procedure followed for applications before the Administrative Tribunal is provided for in the statute and rules of the Tribunal (AT/11/Rev.4). A detailed outline of such procedures is contained in paras. 44-49 of information circular ST/IC/82/7 of 3 February 1982.

12/ The applicable procedure is provided for in article 11 of the statute of the Administrative Tribunal and is described in paras. 50-56 of information circular ST/IC/82/7.

13/ See, in particular, A/40/471, paras. 15-30.

14/ See A/48/572, paras. 26-33.

15/ ST/AI/155/Rev.2 of 31 August 1990.

16/ See A/48/572, paras. 6-10.

17/ See Yearbook of the International Law Commission, 1967, vol. II, p. 216.

18/ See A/48/572, paras. 12-18.

Annex

LIST OF REFERENCE DOCUMENTS

General Assembly resolution 48/218 of 23 February 1993 on the review of the efficiency of the administrative and financial functioning of the United Nations.

Report on standards of conduct in the international civil service, Coord/Civil Service/5, 1986 edition.

United Nations Administrative Tribunal, Statute and Rules, AT/11/Rev.4.

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